No. 71-865

JUN 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

POST-NEWSWEEK STATIONS, CAPITAL AREA, INC.,

Petitioner,

v.

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR POST-NEWSWEEK STATIONS, CAPITAL AREA, INC.

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Joseph Burstyn, Inc. v. *Wilson*, 343 U.S. 495 (1952) 28

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Wirta v. *Alameda-Contra Costa Transit District*, 434 P.2d 392 (Calif. 1967) 27

FCC Decisions and Reports:

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Democratic State Central Committee of California, 19 F.C.C.2d 833 (1968) 37

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Study of Fairness Doctrine, 30 F.C.C.2d 26 (1971) . 15-16, 18, 44

United Broadcasting Co., 10 F.C.C. 515 (1945) 37

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Communications Act of 1934, 47 U.S.C. §151 *et seq.*:

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Section 309, 47 U.S.C. §309 21
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Alfred I. duPont–Columbia University, *Survey of Broadcast Journalism* 1969-1970 (1970) 22, 60

Alfred I. duPont–Columbia University, *Survey of Broadcast Journalism* 1970-1971 (1971) 22

M. Arlen, *The Living-Room War* (1969) 22

Z. Chafee, *Government and Mass Communications* (1947) 19, 39, 62

H. Childs & B. Whitton, *Propaganda by Short Wave* (1942) 29

Comments of Washington Post Co., *et al.* in docket 18110, May 17, 1971 5

67 *Cong. Rec.* 12501-03 (1926) 17, 36

"Development in the Law–Equal Protection," 82 *Harv. L. Rev.* 1065 (1969) 49

T. Emerson, *The System of Freedom of Expression* (1970) 20, 62

W. Emery, *Broadcasting and Government* (1971) 25, 34

Friendly, "The Bill of Rights As a Code of Criminal Procedure," 53 *Calif. L. Rev.* 929 (1965) 60

FCC, *Broadcast Stations Totals* for December 1971, Jan. 11, 1972 54

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H.R. 3595, 80th Cong., 1st Sess. (1947) 39
H.R. 6949, 81st Cong., 2d Sess. (1950) 39
H.R. 7986, 73d Cong., 2d Sess. (1934) 36
H.R. 19904, 91st Cong., 2d Sess. (1970) 49
H. Rep. No. 91-257, 91st Cong., 1st Sess. (1969) 33
F. Irion, *Public Opinion and Propaganda* (1950) 29
Jaffe, "The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access," 85 *Harv. L. Rev.* 768 (1972) 44, 59
Joint Comments of BEM, *et al.* in Docket 19260, March 21, 1972 43
Kalven, "Broadcasting, Public Policy and the First Amendment," 10 *J. of Law & Econ.* 15 (1967) 33, 60
Loevinger, "Free Speech, Fairness, and Fiduciary Duty," 34 *Law & Contemp. Prob.* 278 (1969) 38
Manelli, Legislative History of the Fairness Doctrine (1968), reprinted in *Hearings on the Fairness Doctrine Before the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce*, 90th Cong., 2d Sess. (1968) 36
A. Meiklejohn, *Political Freedom* (1948) 20
New York Times, Dec. 6, 1970 48
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Note, "Regulation of Program Content by the FCC," 77 *Harv. L. Rev.* 701 (1964) 25
Robinson, "The FCC and the First Amendment," 52 *Minn. L. Rev.* 67 (1967) 33
A. Schlesinger, *The Politics of Upheaval* (1960) 29
S. 6, 71st Cong., 1st Sess. (1929) 36

S. Rep. No. 772, 69th Cong., 1st Sess. 4 (1926) 36

H. Skornia, *TV and Society* (1965) 8

E. Smead, *Freedom of Speech by Radio and Television,* (1959) 8

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Statement of John O'Toole, 118 *Cong. Rec.* S 985-86 (daily ed. 1972) 47

Statement of Senator Stevenson, 118 *Cong. Rec.* S 985 (daily ed. 1972) 49

U.S. Census Bureau, *Statistical Abstract of the United States* (1971) 54-55

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ON WRIT OF CERTIORARI TO THE UNITED STATES
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OPINIONS BELOW

The opinion of the Court of Appeals is officially reported at 450 F.2d 642 (A. 446).[1] The opinion of the

[1] "A.___" refers to the one-volume appendix jointly filed in this case and in three other cases: *CBS* v. *Democratic National Committee*, No. 71-863; *FCC* v. *Business Executives' Move for Vietnam Peace*, No. 71-864; and *ABC* v. *Democratic National Committee*, No. 71-866. In each case review is sought of the same

Federal Communications Commission is officially reported at 25 F.C.C.2d 242 (A. 357).

JURISDICTION

The judgment of the Court of Appeals was entered on August 3, 1971 (A. 492) and a timely petition for rehearing was denied on October 4, 1971 (A. 494). The petition for a writ of certiorari was filed on January 3, 1972, and was granted by this Court on February 28, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution and Sections 3(h) and 315(a) of the Communications Act of 1934, 47 U.S.C. §§ 153(h), 315(a), which are set forth in an addendum at pp. 1a-2a, *infra*.

QUESTION PRESENTED

Whether the First Amendment requires a radio station, which provides fair and effective coverage of the diverse viewpoints on controversial public issues, to sell on demand broadcast advertising time to private individuals or groups for brief "spot" announcements asserting their views on controversial issues.

Court of Appeals' decision and the cases have been consolidated by this Court.

STATEMENT

In the decision below, a divided Court of Appeals held, over the opposition of the responsible agency, that the First Amendment compels a basic change in the methods long used by many broadcasters to inform the public. While the lower court treated the issue in comparatively abstract terms, an understanding of the actual station practices involved and the regulatory regime that governs broadcasting are essential to appreciate the context and consequences of its decision.

A. WTOP'S FAIRNESS OBLIGATION AND ITS COVERAGE OF CONTROVERSIAL PUBLIC ISSUES.

Petitioner, Post-Newsweek Stations, Capital Area, Inc. ("WTOP"), owns and operates radio station WTOP. WTOP is one of 18 radio stations located in the District of Columbia and one of 43 which serves the District of Columbia area (A. 329). Broadcast stations are subject to the Communications Act of 1934 ("the Act") and to regulation by the Federal Communications Commission, but the Act expressly states that a station is not to be deemed a "common carrier."[2]

For many years the Commission has imposed on broadcasters the dual responsibility to afford adequate coverage of public issues and to reflect the diversity of contrasting views on such issues.[3] This requirement,

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[2]Section 3(h) of the Act, 47 U.S.C. §153(h), provides, *inter alia*, that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."

[3]See, *e.g.*, *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949); *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 F.C.C. 598 (1964) ("*Fairness Primer*").

known as the "fairness doctrine," has been premised on the Act's public interest standard (see Section 309, 47 U.S.C. § 309), and has received explicit congressional approval in Section 315(a), 47 U.S.C. § 315(a), which speaks of "the obligation imposed upon . . . [broadcasters] under this [Act] . . . to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." The fairness doctrine was vigorously endorsed by this Court in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), which emphasized its basic purpose of assuring that the public is properly informed.

Under the fairness doctrine, a station is expected to take affirmative steps to identify and provide balanced coverage of important public issues. *E.g., John J. Dempsey*, 6 P&F R.R. 615 (1950). The Commission's decision in *Cullman Broadcasting Co.*, 40 F.C.C. 576 (1963), further requires that where one side of a controversial issue is aired by a station, it must broadcast contrasting views at its own expense if sponsorship is not available. The fairness doctrine is enforced through individual complaint proceedings (*e.g., Red Lion*), and the license renewal process.[4]

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[4] The Commission not only entertains objections to renewal based on fairness doctrine violations but it elicits information to determine what efforts the station makes to inform the public. For example, a renewal applicant must disclose the methods used "to ascertain the needs and interests of the public served by the station" including "identification of representative groups, interests and organizations which were consulted" to determine matters of interest to the community. FCC Form 303, § IV-A, pt. I. Programs designed to meet those needs and interests must be listed. *Id.* The applicant must also describe its news gathering staff and facilities, its public affairs programming, and its policies for making time available for the discussion of public issues. *Id.*, pt. II.

WTOP not only meets but far exceeds the requirement that due attention be given to controversial issues. Being what is popularly described as an "all-news" station, most of WTOP's program time is devoted to public affairs (A. 337). The station's coverage includes not only extensive news reporting but also commentaries, interviews and panel discussions, special events coverage, station editorials and reply editorials by private citizens and groups (see A. 313-15).[5] WTOP also broadcasts two CBS network news interview programs—*Face the Nation* and *Capitol Cloakroom*—on which national leaders regularly appear (A. 315).

WTOP strives to provide balanced coverage of the subjects it airs so that the public may be exposed to diverse views. In its news coverage, the station reports the views and activities of groups and individuals on all sides of controversial questions, as its coverage of the Vietnam war illustrates (see pp. 9-10, *infra*); with the same objective, the station seeks representatives of diverse viewpoints for its interviews and panel discussions. See p. 10, n. 13, *infra*. WTOP's regular commentators, who express their own viewpoints on controversial issues, similarly cover a broad spectrum of opinion.[6] When WTOP presents editorials on controversial issues, it seeks out responsible spokesmen to present contrasting viewpoints to be aired without charge by the station in reply

[5] WTOP is owned indirectly by the Washington Post Company, but its editorial policies are determined wholly independently of those the newspaper. See Comments of Washington Post Co., *et al.* in Docket 18110, May 17, 1971, pp. 3-4.

[6] When this case began WTOP regularly broadcast the views of four commentators reflecting their contrasting opinions on numerous issues: Carl Rowan, Drew Pearson, Rod MacLeish, and James J. Kilpatrick (A. 314).

editorials. See *Federation of Citizens Ass'ns,* 21 F.C.C.2d 12, 13 (1969).

The Commission has taken the view that, in complying with the fairness doctrine, a broadcast station should not restrict its coverage of public issues to impartial commentary but should also provide for the airing "partisan" voices.[7] WTOP's format assures that such partisan voices are repeatedly heard: through press conferences, news interviews and meetings covered in news reporting; from its independent commentators; in panel discussions and interview programs such as *Face the Nation;* and through station editorials and replies (A. 315-17).

While insisting upon strict compliance with the fairness doctrine, the Commission has stressed that it is for the broadcaster to make a "good faith exercise of his best judgment" in selecting the manner, timing and spokesmen for presenting varying points of view on controversial issues. *Fairness Primer,* 40 F.C.C. 598, 609 (1964). The overriding purpose of the fairness doctrine is "to inform the public" and secure its "paramount right to hear opposing views on controversial issues . . . ." *Id.* at 609. Accordingly, with very limited qualifications,[8] the

[7] *E.g., Storer Broadcasting Co.,* 11 F.C.C.2d 678 (1968), *aff'd sub nom. Anti-defamation League* v. *FCC,* 403 F.2d 169, 170 (D.C. Cir. 1968), *cert. denied,* 394 U.S. 930 (1969). See also *Red Lion,* 395 U.S. at 392 & n. 18.

[8] Under Section 315(a) of the Act, 47 U.S.C. §315(a), Congress has required that a station affording broadcast time to one election candidate shall, with certain exceptions, provide equal time for his opponents. In addition, regulations of the Commission (*e.g.,* 47 C.F.R. §73.123), which were approved by this Court in *Red Lion,* essentially provide that proper compliance with the fairness doctrine means that, in the cases of specified attacks on individuals and of editorials endorsing candidates, the individuals attacked and the candidates not endorsed are the proper persons to present the contrary viewpoint to the public.

Commission has repeatedly held that no individual or group has a private "right" to command the use of a station's facilities to express its views on a subject. See pp. 37-38, *infra*.

B. THE COMMISSION PROCEEDING.

In June 1969 the respondent, Business Executives' Move for Vietnam Peace ("BEM"), requested WTOP to sell it "spot" advertising time for a series of 60-second commercials conveying BEM's opposition to the Vietnam War (A. 291). These commercials, an example of which appears in the margin,[9] typically contained about 20-35 seconds of substantive argument (A. 317). In essence, all involved variations on the theme that the United States should withdraw from the Vietnam war (A. 360).

WTOP declined to accept the advertisements based on its longstanding policy not to sell spot time for the expression of personal views on controversial subjects (A. 297).[10] The policy is grounded in the station's judgment

[9] "ANNOUNCER: Rear Admiral Arnold E. True has an urgent message for you. TRUE: Much is said of an honorable end to the Vietnam War. This war is morally corrupt, politically inept, and militarily stupid. Honor is involved in getting out rather than staying in. If a man falls into a cesspool, he gets out in the most graceful and rapidest way he can. He does not stay in for honor or to save face. ANNOUNCER: The preceding public service message was brought to you by Business Executives' Move for Vietnam Peace. For your free copy of Rear Admiral True's complete statement on Vietnam, write to BEM, 901 North Howard Street, Baltimore, Maryland, 21201, or the station to which you are listening" (A. 298-99).

[10] The only exception is spots sold to candidates and for other election-related matters. Both Congress and the Commission have treated election advertising as a special category (see p. 6, n. 8, *supra*) and the Act has recently been amended to make a station's

that the public interest is best served by coverage of controversial issues, without charge, in the extensive news and public affairs programming of the station. As WTOP stated in its letter to BEM, it believes that such issues normally call for a more thorough analysis than can be provided in a spot announcement of 10, 20, 30 or 60 seconds (A. 297).[11] In addition, it considers that such spot announcements would impair its ability to maintain balanced coverage of conflicting views, by providing undue emphasis on the subjects and viewpoints of those best able to afford such advertising and by duplicating coverage of some issues while forcing the station to divert time from others warranting exposure (A. 335-37).

The same policy with respect to editorial spots is shared by other stations (see A. 251-52). Far from being a recent innovation, the view that such commercials are poor journalistic practice dates back many years.[12] Some stations do accept such editorial commercials including stations in the Washington area (A. 329). The Commission has regarded the question as one for the exercise of each station's own judgment of how best to achieve

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failure to furnish or sell reasonable amounts of time for federal candidate use a ground of license revocation. Federal Election Campaign Act of 1971, §103, 86 Stat. 3, 4.

[11] The station and guest editorials aired on WTOP run two minutes or more and other programs on controversial issues extend for as long as half an hour or more (A. 317).

[12] For example, the head of one of the networks stated to a broadcasting conference in 1937: "We sell time to sponsors solely for the advertising of their goods. We do not sell time for propaganda. . . . The sole exception we make to this policy is the sale of time to political parties during an actual election campaign." H. Skornia, *TV and Society* 30 (1965). See also E. Smead, *Freedom of Speech by Radio and Television* 48-49 (1959).

the ultimate goal of providing adequate and balanced coverage of controversial issues (A. 265).

In the present case, seven months after WTOP declined to air BEM's announcements, BEM complained to the Commission on January 22, 1970, alleging that the station had violated the fairness doctrine by devoting too much time to the administration's views on the Vietnam war and inadequately portraying the views of administration opponents (A. 291, 293). Although the *Fairness Primer*, 40 F.C.C. 598, 600 (1964), specifies that a complainant is to submit information showing "the basis for the claim that the station has presented only one side of the question," BEM never attempted to provide any such evidence. The complaint also charged that WTOP's refusal to broadcast BEM's commercials violated the public's "right to hear" and the First Amendment (A. 294-96). As relief, BEM requested the Commission to order WTOP to broadcast the commercials "free of charge" or, in the alternative, to require WTOP to sell BEM air time for the announcements (A. 296).

In subsequent submissions, WTOP showed that it had conveyed the views of a wide variety of administration critics and supporters on the Vietnam war on numerous occasions (A. 313-15). Its recent coverage included press conferences and meetings of groups opposing and supporting the war; as examples, the station cited coverage of such anti-war groups as the Vietnam Moratorium Committee, the D.C. Moratorium Committee, and the New Mobilization Committee to End the War in Vietnam, while pro-administration groups included Americans for Peace with Freedom, the Freedom Rally Committee, and the Young Americans for Freedom (A. 314-15).

Partisan voices expressing opinions on the war were heard repeatedly on the station in special events coverage

and through regular news interview programs which "consistently provided opportunities both for supporters and opponents of the President's policy" in Vietnam to express their views (A. 315).[13] Regular commentators on the station had broadcast their own diverse opinions on the subject (A. 314). WTOP's executive editor responsible for public affairs programming stated in an affidavit that the very views embodied in each of the BEM spot announcements were of his own knowledge "expressed on a number of occasions in various types of broadcasts over WTOP . . ." (A. 352).

WTOP also explained the reasons for its policy of covering controversial issues through a range of programming while declining to air spot announcements on those subjects (A. 316-17). It noted that the courts and the Commission had rejected the claims of individuals that they had a private "right of access" to require stations to broadcast their private views on controversial issues (*id.*). Although BEM invoked the people's "right to hear" and the First Amendment, citing *Red Lion* as authority, that decision described the broadcaster's obligation as one of presenting "representative" community views on controversial issues (A. 339). In addition, WTOP noted that other Washington, D.C., area stations had carried BEM's own spot announcements (A. 329).

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[13] For example, following a presidential address on Vietnam, the station broadcast comments from five pro-administration representatives and six critics of its policies, and both the supporters and opponents differed in their own opinions. The former group included Senators Goldwater, Tower and Scott and Representatives McCormack and Ford; the latter comprised Senators McGovern, Gore, Goodell, Mansfield, Aiken and Percy (A. 315).

BEM filed its last pleading addressed to the merits on April 7, 1970 (A. 353). On May 19, 1970, the Democratic National Committee ("DNC") filed a request for a declaratory ruling that "a broadcaster may not, as a general policy, refuse to sell time to responsible entities, such as DNC, for the solicitation of funds and for comment on public issues" (A. 247). Believing this request to raise issues related to BEM's own claim, the Commission withheld action in BEM's case while responsive pleadings were filed to the DNC request.

On August 5, 1970, the Commission adopted decisions in both the BEM and DNC cases (A. 357, 247), and by a six-to-one vote it rejected BEM's complaint. In the *DNC* case, the Commission by a similar vote denied DNC's request for a ruling with one qualification. Noting the special importance attached by Congress and prior Commission determinations to the viability of political parties, it held that the networks should either sell or provide free time to political parties for purposes of fund solicitation (A. 270-73).

The Commission decisively rejected the charge that WTOP's coverage of the Vietnam war had been shown to be inconsistent with the fairness doctrine. Its opinion reviewed the evidence reflecting the station's coverage of diverse and partisan opinions on the war and it noted the lack of any evidence from BEM to support a charge of unfairness (A. 360-64). [14]

[14] The Commission stated that no "undue burdens" should be placed on complainants but said there must be "some basis" for a fairness complaint before a station should be compelled to furnish a detailed refutation (A. 364). As an example, it noted that a complainant could readily monitor a few days of news or public affairs programming as a basis for its complaint (*id.*). BEM thereafter did monitor WTOP for a full day, attaching its survey to its opening brief in the lower court, but the survey merely listed

It cited its recent rejection of a fairness doctrine complaint against WTOP based upon similarly vague allegations that the station had presented only the "liberal" viewpoint on public issues (A. 363). The decision pointed out that "because of the multiplicity of spokesmen available to express views on the Vietnam war, it is obvious that a licensee must exercise its judgment in choosing appropriate spokesmen" to present conflicting views. It found no evidence that WTOP had failed to exercise a reasonable good faith judgment (A. 362). The dissenter—Commissioner Johnson—did not dispute this determination.

The Commission also rejected, with Commissioner Johnson dissenting, BEM's alternative argument that it had a right to compel WTOP to sell it time for its spot announcements even though the station had provided full and fair coverage of the varying viewpoints on the Vietnam war.[15] After reviewing the Act's history and pertinent precedents, the Commission reaffirmed that each station had the responsibility to make its own choice of speakers and formats for covering controversial issues (A. 260-69), and it declined to dictate station policy on the use of editorial commercials (A. 265). The Commission also explained how balanced coverage of the range of controversial issues could be seriously impaired if the compulsory access approach urged by DNC and BEM were adopted. It said, for example, that under this approach:

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commercials carried on the station and did not seek to demonstrate any unfairness in WTOP's coverage of the war.

[15] Most of its discussion of this claim occurred in its *DNC* opinion which the Commission expressly made applicable to the *BEM* case by cross-reference (A. 366-67).

"[T]he public's agenda for discussion of public issues would then be set substantively and increasingly by the affluent . . . . [In addition, such purchases would under the fairness doctrine themselves] impose the burden to present reasonably the other viewpoint, and in turn would inevitably cut down on the amount of time for discussion of other issues" (A. 263).[16]

As for the claim that *Red Lion* or the First Amendment required a private right to compel access, the Commission observed that *Red Lion* and other decisions of this and other courts refuted rather than supported the argument. In *Red Lion* this Court had defined the overriding "right" in broadcasting as the public's right to "suitable access to . . . ideas and experiences" (A. 366) rather than any individual's private claim to use the airwaves. WTOP thus satisfied its obligation when it provided fair and balanced coverage of conflicting views on the Vietnam war (A. 368).

C. THE COURT OF APPEALS DECISION.

Both BEM and DNC sought review of the Commission's decisions in the United States Court of Appeals for the District of Columbia Circuit. There, BEM abandoned its original claim that WTOP had failed to give fair coverage to the war and instead contended solely that the First Amendment and the public interest standard of the Act required the station to accept BEM's editorial commercials (A. 452). The lower court also treated

[16] The decision also noted that the station would lose its control over the "manner" in which it presented public issues (A. 264) and that under *Cullman* (p. 4, *supra*) the obligation to provide free reply time if necessary might affect on the station's ability to serve the public interest (A. 264-65).

DNC's appeal as directed essentially to the same kind of compulsory access demanded by BEM (A. 453). In a two-to-one decision, Judge McGowan dissenting, the court reversed the Commission.

Judge Wright's majority opinion first asserted that the action of individual broadcasters constituted state action so that the restraints imposed by the First Amendment on the Federal Government applied directly to each station. The opinion emphasized that broadcasters are licensed and regulated by a federal agency, and that broadcasting has great "importance and suitability" as a medium for the communication of ideas (A. 455-64). It rejected the contrary state action determination of three other federal courts–including the First Circuit and the Third Circuit–as representing "a crabbed judicial view" and "doctrinal impedimenta" (A. 456).

Based on its state action holding, the court of appeals then held that the First Amendment required WTOP and other broadcasters to accept editorial commercials regardless of whether the stations were providing substantial and balanced coverage of controversial issues, including "representative community views," in compliance with the fairness doctrine and *Red Lion* (A. 469-82). The court stressed the benefits of partisan commentary on controversial issues (A. 466-67) but ignored the record evidence that WTOP provides a range of partisan views on such issues. The court also asserted that the station's practice of covering controversial issues in program time while limiting spot advertisements to products and services was impermissible "discrimination" in favor of commercial messages and against controversial issues (A. 474-80).

As for the host of administrative and policy problems raised by its decision, the court directed the Commission to resolve them by promulgating "guidelines" to govern access (A. 484-86).[17] At the same time the court arrayed its opinion with warnings that various potential limitations that might be contemplated would infringe the Constitution. In particular, the court stated that the station "should not begin to exercise the same 'authoritative selection' in editorial advertising which [it] . . . exercises in normal programming" (A. 485).

In dissent, Judge McGowan pointed out that *Red Lion* refuted any claim of an "unabridgeable First Amendment" right of private individuals to broadcast and that stations are obliged by the fairness doctrine to present a fair cross section of views on controversial public issues (A. 489-90). This system of broadcasting, chosen by Congress, was "within the permissible limits of constitutional choice" and had generally proved an effective means for implementing the public's right to know (A. 490). By contrast, compulsory access invited a regime in which "money alone determines what issues are to be aired" and the majority's decision curtailed the Commission's flexibility to determine the future course of development of the fairness doctrine (A. 490-91).[18]

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[17] The problems included the application of the fairness doctrine to editorial commercials, possible requirements that such commercials be placed during popular periods of the broadcast day, measures to forestall the domination of the airwaves by those best able to afford advertising time, the permissible limits of broadcaster control over commercials that might be false or defamatory, and the use of quotas to curtail the amount of time made available for editorial advertisements (*e.g.*, A. 485).

[18] Judge McGowan drew attention to a broad-gauged investigation of the fairness doctrine begun by the Commission prior to the lower court's decision and currently under way. *Study of Fairness*

Following the lower court's decision, petitions for certiorari were filed in this Court by the Commission and the United States, by WTOP, by CBS and by ABC (see p. 1, n. 1, *supra*). The court of appeals refused to stay the effectiveness of its decision pending review in this Court. Thereafter, this Court granted the petitions for certiorari, ordered the recall of the lower court's mandate and deferred the implementation of the decision pending review.

SUMMARY OF ARGUMENT

A broadcaster who is obligated to provide the public with balanced and effective coverage of controversial issues does not violate the First Amendment by declining to sell spot advertising time to private individuals seeking to express their personal views on such issues. This Court's decisions confirm that the central purpose of the First Amendment is to maintain a "marketplace of ideas" open to the public. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). In the field of broadcasting, this end is attained when each station exercises its best journalistic judgment in furnishing "representative community views" on controversial issues in accordance with the fairness doctrine. *Id.* at 394. See *Fairness Primer*, 40 F.C.C. 598 (1964).

Unlike most other modes of expression, "radio inherently is not available to all . . . . [and thus] some who wish to use it must be denied." *NBC v. United States*, 319 U.S. 190, 226 (1943). In broadcasting, therefore, private claims are subordinate to the public's interest in "access

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Doctrine, 30 F.C.C.2d 26 (1971). Among the many issues the Commission said it would consider in that proceeding was whether some method of "access" would be desirable and workable. *Id.* at 33. See p. 44, *infra*.

to . . . ideas" (*Red Lion*, 395 U.S. at 390) and freedom of speech does not mean that any private individual may insist that a broadcaster carry his own message. *E.g.*, *McIntire v. Wm. Penn Broadcasting Co.*, 151 F.2d 597 (3d Cir. 1945), *cert. denied*, 327 U.S. 779 (1946). The lower court's approach would, in fact, disserve First Amendment interests by giving undue influence to the wealthy in choosing the issues for discussion in broadcasting and by interfering with the operation of the fairness doctrine. It would also entail increasing and pervasive control by the government of what may and may not be said in the broadcast media.

The decision below imposes a constitutional strait jacket on broadcast regulation and is squarely inconsistent with the statutory plan devised by Congress. The Communications Act provides that broadcasters shall not be deemed "common carriers" (Section 3(h), 47 U.S.C. § 153(h)), and Congress in framing the predecessor statute considered and rejected a proposal requiring broadcasters to provide access on demand for individuals to address public issues covered by the station. See 67 *Cong. Rec.* 12503 (1926). The decision to impose responsibility for selecting speakers and formats on each broadcaster, rather than to employ a common carrier scheme, is a constitutionally permissible choice for Congress. Judicial interference with that choice is especially inappropriate because Congress has maintained continuing oversight (*e.g.*, Federal Election Campaign Act of 1971, 86 Stat. 3) and technological developments require flexibility instead of freezing communications policy in a constitutional mold.

The Commission amply justified its refusal to dictate station practice with regard to editorial commercials. Legislative history and legal precedent affirm that sta-

tions have broad discretion in selecting the manner of informing the public, and the Commission considered that to require editorial spots would impair the operation of the fairness doctrine and defeat the public interest. The lower court's contrary decision compels the Commission to embark on a complex regulatory adventure, which includes establishment of "guidelines" and presages continuous administration of the court's access scheme. This mandate usurps the authority of the responsible agency just as it is currently undertaking a general review of the interrelated problems of fair coverage and considering its own solutions. *Study of Fairness Doctrine*, 30 F.C.C. 2d 26 (1971).

WTOP's decision to present controversial issues through a range of programming rather than editorial commercials is a reasonable journalistic judgment well within its lawful discretion as trustee for the public interest. A station may reasonably conclude that 60-second spots on controversial questions are too short to attain real benefits and that, by upsetting the balance in subjects and diverting additional time for replies, such editorial commercials will hinder the full and fair coverage of public issues. WTOP's policy involves no invidious discrimination; its different treatment of public issues and product commercials is not only rationally justified but works to promote the public's right to know. See *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955).

The lower court also erred in holding that WTOP's policy respecting editorial advertisements, which was neither instigated nor compelled by the Commission, constituted state action. Congress did not make broadcast stations instrumentalities of the Federal Government, as two other circuits have affirmed (*e.g.*, *McIntire v. Wm.*

Penn Broadcasting Co., supra), and nothing in this Court's state action decisions warrants a contrary result. Extension of the state action concept to broadcaster decisions, already subject to Commission regulation, would simply require the courts perpetually to decide questions of communications policy on constitutional grounds. This extension would also undermine the desirable separation of government and the media including newspapers and, as the vehicle of further restraints on journalistic judgment, would impair the interests of free speech. II Z. Chafee, *Government and Mass Communications* 707-10 (1947).

ARGUMENT

I. BROADCASTERS ARE OBLIGATED TO PROVIDE BALANCED COVERAGE OF DIVERSE VIEWS ON CONTROVERSIAL PUBLIC ISSUES THROUGH NORMAL PROGRAMMING AND ARE NOT REQUIRED BY THE FIRST AMENDMENT TO SELL SPOT ADVERTISING TIME TO PRIVATE INDIVIDUALS OR GROUPS TO EXPRESS THEIR PERSONAL VIEWS.

A. The First Amendment Interest in Broadcasting Is Served by Allowing Independent Stations To Present Representative Community Viewpoints on Controversial Issues.

The First Amendment provides in relevant part that "Congress shall make no law . . . abridging freedom of speech . . . . " Even on the challenged assumption that the station is engaged in state action and stands in the shoes of Congress (see pp. 52-62, *infra*), WTOP in no way infringed this prohibition for, judged by the ultimate

touchstone of constitutional purpose,[19] the station's fair coverage of diverse views and contentions secures the paramount First Amendment stake in broadcasting—the public's right to know.

As this Court has repeatedly stated, the central purpose of the First Amendment is to preserve a "marketplace of ideas" for the American people.[20] Assuring that the full spectrum of ideas and opinions are available to the public is basic to democratic self-government (*e.g.*, *Mills v. Alabama*, 384 U.S. 214 (1966)), and is conceived as a condition of civilized life and progress in our society. T. Emerson, *The System of Freedom of Expression* 6-9 (1970). Thus, the thrust of the constitutional guarantee of free speech is directed to safeguarding the public's interest in ideas.

Any suppression of *ideas* is therefore severely confined by the First Amendment even in the face of great national interests (*e.g.*, *New York Times Co. v. United States*, 403 U.S. 713 (1971)), while reasonable limitations on the time, place or manner of speech are well established for myriad public purposes.[21] "What is essential is not that everyone shall speak, but that everything worth saying shall be said." A. Meiklejohn, *Political Freedom* 26 (1948). Consonantly, this Court's

[19] See *Red Lion*, 395 U.S. at 390-92; *United States* v. *Classic*, 313 U.S. 299 (1939); *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

[20] *E.g.*, *Red Lion*, 394 U.S. at 390; *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). See *Whitney* v. *California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring); *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[21] *E.g.*, *Adderley* v. *Florida*, 385 U.S. 39 (1966); *Cox* v. *Louisiana*, 379 U.S. 559 (1965); *Beard* v. *Alexandria*, 341 U.S. 622 (1951); *Kovacs* v. *Cooper*, 336 U.S. 77 (1948).

leading opinion defining the First Amendment interest in broadcasting affirmed the public's right "to receive suitable access to social, political, esthetic, moral, and other ideas and experiences . . . . " *Red Lion*, 395 U.S. at 390.

The objective of public "access" to representative views on significant issues is achieved in broadcasting by the operation of individual stations within the framework devised by Congress and administered by the Commission. Under the statutory plan, Congress has entrusted thousands of broadcasters with the responsibility, free from the stifling effect of government domination, to assure that the public is fully and fairly informed. See pp. 34-38, *infra*. These independent stations and the many individual, often partisan voices that speak through them provide a wide diversity of ideas and opinions to the public on a vast range of controversial issues.

The public's exposure to conflicting views and partisan voices is further secured by the fairness doctrine and ancillary requirements enforced by the Commission. These obligations require, as this Court said in *Red Lion*, "that discussion of public issues be presented on broadcast stations and that each side of those issues must be given fair coverage." 395 U.S. at 369. They also call for affirmative measures by each station to attain this goal of public exposure, including the presentation of speakers committed to contrasting positions. See p. 6, *supra*. If a station fails to meet these obligations the available sanctions include the most severe measures possible: revocation or non-renewal of a broadcaster's license. Sections 308-09, 312, 47 U.S.C. § § 308-09, 312.

Subject to these obligations, each station exercises an essentially journalistic function in planning its own

programming. Thus, WTOP must select and balance subjects, formats, and speakers for the very purpose of assuring that a significant variety of different important issues and competing viewpoints are effectively presented; indeed, the necessity of responsible choice cannot be avoided since the demand for broadcast time is greater than its supply. Under the fairness doctrine, however, WTOP is not entitled to exclude any viewpoint from the air because WTOP disagrees with it, because it is unpopular, or because the station believes it to be iniquitous.[22]

As the dissenting judge observed below, the regime of independent stations subject to the fairness doctrine has in general effectively served "the public's right to know," and the loudest complaints of broadcasters' coverage of public issues has been from those who find them too effective (A. 480). The range and vigor of broadcast reporting and commentary on such issues, including the Vietnam war, is amply documented; and responsive criticism by officials whose policies are subject to scrutiny confirms the need for broadcaster independence.[23] Nothing in the present case suggests that the

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[22] The Commission said long ago that stations are required to cover public issues under the fairness doctrine "without regard to personal views and opinions of the licensee on the matter or any determination by the licensee as to the possible unpopularity of the views to be expressed on the subject matter to be discussed among particular elements of the station's listening audience." *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1250 (1949).

[23] See generally M. Arlen, *The Living-Room War* (1969); Alfred I. duPont–Columbia University, *Survey of Broadcast Journalism* 1969-1970, at 31-45, 67-80, 112-121 (1970); *id.* 1970-71, at 7-61 (1971).

existing design of broadcasting is inadequate to assure a "marketplace of ideas" for the public.

The record here shows that WTOP devoted substantial time to Vietnam war policy as an important subject of public concern, and it was discussed in many formats from hard news to interviews to special event coverage. The station strived to assure balanced coverage; it reported the activities and meetings of both anti-war and pro-administration groups; it presented in debates and interviews congressional and other spokesmen holding widely differing views; and its own commentators reflected a range of opinions about the war. See pp. 9-10, *supra*. The evidence refutes any claim that the subject of the war or BEM's viewpoint on it was scanted by the station, and BEM has itself abandoned its charge that the fairness doctrine was violated.

WTOP's coverage of the war issue was not confined to impartial or detached analysis; it has repeatedly provided time for individuals to express their own views on the matter. Zealous advocates of different positions on the war made their arguments through press conferences, speeches, interviews and panel discussions. *E.g.*, p. 10, n. 13, *supra*. No debate on Vietnam war policy could be conducted in a manner more "uninhibited, robust and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

It would be incredible on the present record to suggest that the broadcast public has been deprived of effective "access to . . . ideas" advocated by BEM. Their substance is the staple of arguments on the Vietnam war that have echoed through the country for years and have been carried by WTOP and countless other stations. In fact, "each of the viewpoints embodied in the BEM announce-

ments has been expressed on a number of occasions in various types of broadcasts over WTOP by critics of the Vietnam War . . . " (A. 352). No evidence to the contrary has ever been submitted by BEM in this case.

Thus, independent station responsibility, coupled with the fairness doctrine, serves the purpose of the First Amendment to ensure public exposure to the full range of competing viewpoints on important issues. See *Red Lion*, 395 U.S. at 390-94. WTOP's coverage of the Vietnam war debate portrays the fair and effective coverage that results from this congressional and administrative plan. Constitutional objectives are not frustrated by the plan or by WTOP's policies—they are achieved; and this overriding fact is fatal to any charge of constitutional violation.

B. There Is No Private Constitutional Right Requiring Stations To Sell Time to Individuals To Assert Personal Views on Controversial Issues Subject to the Fairness Doctrine.

BEM has asserted that private individuals and groups possess a constitutional "right of access" to the airwaves and the lower court has held that such an "abridgeable" right exists (A. 467). WTOP, as the fairness doctrine requires, already provides access for competing ideas, including BEM's own viewpoint. By airing partisan voices in news, interviews, special events coverage, debates and other programming, the station also provides access for individuals to be heard. Thus, what BEM claims is the right to compel a broadcaster to carry the views of particular speakers on a particular subject in a commercial spot format, regardless of the issue, regardless of other issues competing for attention, and regardless even

of prior coverage of the same views on the same issue. Decisions applying the First Amendment in the context of broadcasting have decisively rejected such a claim.

The dominant characteristic of broadcasting is its limited capacity: available spectrum space can accommodate only a certain number of stations and there is a maximum number of hours in each broadcast day. As this Court said in *NBC v. United States*, 319 U.S. 190, 226 (1943), "unlike other modes of expression, radio inherently is not available to all. . . . Because it cannot be used by all, some who wish to use it must be denied." It has thus long been settled that Congress and the Commission may reasonably regulate this scarce resource to achieve the greatest benefit for the public as a whole.[24]

The similar teaching of *Red Lion* is that private claims to the operation or use of a broadcasting facility are subordinated to the "paramount" public interest, whether those private claims are advanced on behalf of "individuals who want to broadcast" or by the broadcasters themselves. 395 U.S. at 389-90. Upon this principle, this Court has tolerated regulation of broadcasters' programming that in most other media would be swiftly rebuffed by the First Amendment. No newspaper needs to submit its format to agency scrutiny and a soapbox speaker is not obliged fairly to present conflicting viewpoints.[25] The same subordination to the public

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[24] *E.g., Radio Comm'n* v. *Nelson Bros. Co.*, 289 U.S. 266 (1933); *KFKB Broadcasting Ass'n* v. *Federal Radio Comm'n*, 47 F.2d 670 (1931). See generally W. Emery, *Broadcasting and Government* 13-53 (1971).

[25] See generally Note, "Regulation of Program Content by the FCC," 77 *Harv. L. Rev.* 701 (1964); *Report on Programming Policy*, 20 P&F R.R. 1901, 1915-16 (1960); *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1253 (1949).

interest applies equally to private individuals who are not broadcast licensees. The First Amendment, as construed by this and other courts, confers on such persons no private right to command the use of a radio station carrying out its mandated duty to inform the public.

This Court said in *Red Lion* that "it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." 395 U.S. at 388. There is nothing new or remarkable in this conclusion; the decision authoritatively restates what the Third Circuit said many years ago when it rejected a claim comparable to BEM's and concluded that freedom of speech "does not mean . . . that . . . [an individual] may seize a particular radio station for his forum."[26] Neither Congress nor the Commission has ever accepted the notion of a private constitutional "right of access" of the kind premised by BEM and the lower court. See pp. 34-38, *infra*.

Since this Court has defined the public's interest in broadcasting as "access to . . . ideas" and the Commission has secured that interest through the fairness doctrine (see pp. 3-7, *supra*), it is beside the point that compulsory access of some kind may be called for or permitted in other modes of expression and other contexts. In

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[26] *McIntire* v. *Wm. Penn Broadcasting Co.*, 151 F.2d 597, 601 (3d Cir. 1945), *cert. denied*, 327 U.S. 779 (1946). More recently, the Court of Appeals for the District of Columbia Circuit stated: "No individual member of the public has a right of access to the air; the licensees may exercise their judgment as to what matter is presented and by whom." *Green* v. *FCC*, 447 F.2d 323, 328 (1971). See also *Chicago Joint Board* v. *Chicago Tribune*, 435 F.2d 470 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971) ("free speech does not give [the complainant] . . . the right to make use of the [newspapers'] . . . printing presses" without their consent).

supporting its position, the court below placed great weight on decisions in other inferior courts recognizing a private "right of access" in various situations involving subway and bus posters, leaflets in transport terminals, and advertisements in public school newspapers.[27] Whether or not these cases were rightly decided, they are plainly distinguishable: while in each instance no provision had been made to secure the public's right to be informed on public issues—indeed, controversial subjects were generally barred from the forum—in broadcasting Congress and the Commission have taken comprehensive measures to provide for fair presentation of the range of views on important public issues.

This Court has repeatedly emphasized that the bearing of the First Amendment on an individual medium or forum depends on its nature, the historical traditions associated with it, the regulatory regime to which it is subject, and the accommodating of free speech with other values. Particular cases are not resolved by generalities regarding "forums for communication" (A. 476). Each mode or place of expression—from streets to movie theatres to courtrooms—presents "its own peculiar prob-

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[27] *E.g.*, *Wirta* v. *Alameda-Contra Costa Transit District*, 434 P.2d 987 (Calif. 1967) (busses); *Kissinger* v. *New York City Transit Authority*, 274 F. Supp. 438 (S.D. N.Y. 1967) (subway station); *Lee* v. *Board of Regents*, 306 F. Supp. 1097 (W.D. Wis. 1969) (school newspaper); *In re Hoffman*, 434 P.2d 353 (Calif. 1967) (railroad depot). These and similar cases are distinguishable from the situation in broadcasting, quite apart from the absence of any fairness obligation in those cases, because in almost every instance public instrumentalities or public places were involved. See pp. 52-62, *infra*.

lems." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952).[28]

Since there are more individuals who want to broadcast than there are frequencies to accommodate them, in each instance someone must bear the responsibility for their effective use. Under the Act, that responsibility rests with individual broadcast stations which are subject to a statutory obligation to inform listeners about controversial issues of public importance. Congress' choice among regulatory patterns, where one must necessarily be chosen, is well within its constitutional competence. See pp. 34-40, *infra*.

Accordingly, when the lower court talks of an "abridgeable" right of access subject to Commission guidelines (A. 467, 485), the actual consequence is merely a transfer of authority, which presently resides in the stations acting on behalf of the public, to wealthy private parties and groups subject to no such obligation and to governmental regulators who pose their own dangers to free speech. The First Amendment *ex proprio vigore* does not compel such an adjustment which will impair rather than promote the public's right to know.

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[28] See, *e.g.*, *Estes* v. *Texas*, 381 U.S. 532 (1965); *Cox* v. *Louisiana*, 379 U.S. 559 (1965); *Freedman* v. *Maryland*, 380 U.S. 51 (1965). As another court put the matter, rejecting an alleged "right of access" to compel a law journal to publish an article, "the right to freedom of speech does not open every avenue to one who wishes to use a particular outlet for expression." *Avins* v. *Rutgers*, 385 F.2d 151, 153 (3d Cir. 1967), *cert. denied*, 390 U.S. 920 (1968).

C. A Compulsory Access Regime Will Disserve First Amendment Interests by Impairing Balanced Coverage of Issues and Increasing Government Intervention in Broadcasting.

The manifest impact of the lower court's access regime, if it were ever implemented, would be substantially to increase the influence of wealth in determining what is broadcast. At present, the ability of private interests to mount propaganda campaigns through broadcasting is severely limited because many stations like WTOP decline to sell advertising time for such a purpose. The lower court's decision would require these stations to abandon their existing policies and would thus magnify the advantage already possessed in other spheres by those whose pocketbook is deepest.

Even the court below recognized that it would not serve the public interest in free speech if "a few individuals or groups might come to dominate editorial advertising time" (A. 484-85) and if the airwaves came to be controlled "by only one group from one part of the political spectrum" (A. 485).[29] What the opinion aptly called "a onesided flood of editorial advertisements" (*id.*) would hardly enhance the public's right to know and this Court's own decisions reflect a condign hostility to the "monopolization" of broadcasting by which private

[29] Experience in other countries, and occasional incidents in this one, serve to remind how broadcasting may be misused in this fashion. *E.g.*, H. Childs & B. Whitton, *Propaganda by Short Wave* 49-108 (1942); A. Schlesinger, *The Politics of Upheaval* 16-28 (1960). See generally F. Irion, *Public Opinion and Propaganda* 478-80 (1950): "[Radio] is a superb tool for the agitator, whatever his cause. If it were not for the cost of time on the air and for the numerous restrictions imposed by the radio industry, the agitator would have a field day."

interests expressing their own narrow views drown out the voices of those with whom they disagree. See *Red Lion*, 395 U.S. at 392; *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

The fairness doctrine, invoked by the lower court as an answer to such objections, is more likely to aggravate the harm done by its decision in another way. It is true that a broadcaster might attempt to provide some counterweight to a "onesided flood of editorial advertisements" by presenting contrary viewpoints through other programming. This, however, works its own harm since time would then be diverted from some other subject the broadcaster seeks to cover. The Commission aptly illustrated the point:

> "[S]ince the licensee must afford reasonable opportunity for discussion of both sides, the purchase of substantial blocks of time for a campaign by, say, the oil industry to discuss the issue of the oil depletion allowance would impose the burden to present reasonably the other viewpoint . . . . [W]e believe that such allocations of limited time are to be made on the basis of the *public* interest—not that of any private group, however powerful or affluent" (A. 263-64).

Thus, applying the fairness doctrine to offset any effects of editorial advertising—and the offset can only be partial at best—merely permits a system in which "the public's agenda for discussion of public issues . . . [is] set substantively and increasingly by the affluent . . . " (A. 263).

There is no reason to assume that those best able to afford editorial advertising time are better equipped to strike a balance among subjects of concern to the public than broadcasters operating subject to the fairness doctrine and the license renewal process. The broadcaster is

under an obligation to see that significant and controversial matters are aired; the editorial advertiser, by contrast, may dwell at will upon subjects slight, parochial or inappropriate. The history of demands for air time does not foster confidence in a laissez-faire approach to broadcast programming.[30]

In addition, the lower court's decision is bound to enhance dangerously the control exercised by the government over exactly what is said or not said over the airwaves. The opinion below itself concedes that guidelines prepared and adminstered by the Commission will be necessary to implement its compulsory access regime. It understates, however, the scope and permanence of the governmental intervention and it ignores the pernicious consequences for First Amendment interests.

From the lower court's own opinion it is apparent that it expects the Commission to reach and resolve such questions as when a broadcaster may or should exclude an editorial advertisement because its content is grossly false and misleading (A. 473); whether "representatives of one particular narrow viewpoint" have had enough to say (A. 485); and when a subject or opinion should be aired (see A. 484). Indeed, these are merely examples of numerous issues that the government can hardly avoid facing if it is to impose a compulsory access regime while

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[30] See, *e.g.*, letter to Mrs. Alexandra Mark, FCC 72-278, March 23, 1972, concerning a ruling *inter alia* on "paid advertisements promoting astrology"; letter to The Committee of One Million, FCC 71-1096, Oct. 22, 1971, concerning a demand to purchase time for "a one hour documentary film entitled, 'U.S. China Policy: Danger at the Crossroads' "; letter to Communications Workers of America, FCC 71-832, Aug. 6, 1971, concerning a demand to purchase time for messages to the union members on "contract ratification."

maintaining order on the airwaves. See p. 42, n. 42, *infra*. Yet it should be obvious above all else that under the First Amendment the government ought not be deciding when "one narrow viewpoint" has had its say. "[E]xpressly applying this county's tradition of free expression to the field of radio broadcasting, Congress has from the first emphatically forbidden the Commission to exercise any power of censorship over radio communication." *Farmers Union v. WDAY*, 360 U.S. 525, 529-30 (1959).

Today, thousands of station managers, commentators, interviewees, news reporters, editorialists, and individuals in the news create a "marketplace of ideas" by their separate choices and decisions made in the process of broadcasting. It will not advance free speech interests in broadcasting for a government agency to make such determinations for all stations through uniform guidelines or on any other basis. Five stations in the Washington area did carry BEM's advertisements (A. 329); one may speculate whether it would have fared so well if a government agency were deciding whether its viewpoint had already been given adequate exposure.

The government's overshadowing role in instituting such guidelines would be perpetuated in their administration. Within the framework of guidelines, questions of dominance, falsity, permissible limits on subject matter and the like would necessarily recur on a situation by situation basis and the Commission would be compelled to play a continuing role in resolving disagreements between the stations and editorial advertisers over particular advertisements. Vigorous and independent broadcasting is not likely to be enhanced by this process.

In a number of contexts, this Court has remarked on the "chilling effect" on First Amendment interests posed

by excessive government oversight,[31] and Congress and the commentators have been equally aware that "the line between regulation and censorship is a thin one."[32] On occasions the constraints on broadcasters may be unavoidable, although as this Court noted in *Red Lion*, it would be better if even the fairness doctrine itself were not necessary. 395 U.S. at 393. As those constraints multiply, the danger increases to the very interests the lower court seeks to protect.

No one can measure in advance the precise harm that compelled access would cause to the cardinal aim of full and fair information to the public; but certainly the threats posed—of offering undue influence to powerful interests, of distorting the public's agenda for discussion, and of increasing government regulation of broadcasters—are not chimerical. To say that the First Amendment compels these hazards to be suffered—and irreversibly so since by a constitutional command—is not a tolerable construction of the Constitution.

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[31] *Sheldon* v. *Tucker*, 364 U.S. 479 (1960); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963); *Red Lion*, 395 U.S. at 393-94.

[32] H. Rep. No. 91-257, 91st Cong., 1st Sess. 3 (1969). "It is, however, naive in the extreme to suppose that government supervision, through the fairness doctrine or other means, would ultimately promote hetrodoxy. . . . [G]overment intervention in broadcast programming has in fact been a major impetus toward conformity and orthodoxy." Robinson, "The FCC and the First Amendment," 52 *Minn. L. Rev.* 67, 162 (1967). See also Kalven, "Broadcasting, Public Policy and the First Amendment," 10 *J. of Law & Econ.* 15, 46-48 (1967).

II. THE COMMISSION'S DECISION ACCORDS WITH STATUTORY INTENT AND REPRESENTS A RATIONAL AGENCY JUDGMENT ON A QUESTION OF POLICY.

A. In Regulating Broadcasting Congress Permissibly Chose a System of Independent Broadcasters Rather Than a Common Carrier Regime.

In framing the Communications Act, Congress chose to make each broadcast station responsible, subject to reasonable regulation, for determining how its broadcast facilities should be used, and it deliberately rejected the kind of access regime which the lower court has imposed. This long-respected legislative judgment not only confirms that the Commission correctly parsed the governing statute but weighs heavily against the lower court's constitutional determination.

When Congress designed a regulatory regime for broadcasting it might, as Judge McGowan stated below, have provided for "public ownership and operation of radio and television communications facilities" similar to that in other countries (A. 490). Or, it could have treated broadcasters as "common carriers" required to air messages and programs of all comers on a first-come, first-served basis. Instead, Congress chose to maintain the then-existing pattern of individual station responsibility, and it superimposed a statutory regime of licensing and reasonable regulation by the Commission. See W. Emery, *Broadcasting and Government* 27-44 (1971).

Congress therefore structured the Radio Act of 1927, 44 Stat. 1162—the model for Title III of the present Act (see p. 36, *infra*)—not to regulate broadcasters as common carriers but to preserve their autonomy and

competiton amongst them.[33] The statute contemplated numerous stations subject to the antitrust laws, provided for licensing but prohibited agency censorship, and eschewed the pervasive business and rate regulation applied to utilities and carriers. See 44 Stat. 1162, 1166-70. Subject to limited statutory and agency-created exceptions, "the licensee of a radio station chooses its own advertisers and its own program . . . ." *Pulitzer Pub. Co. v. FCC, supra*, 94 F.2d at 251. *Accord, Regents of New Mexico College v. Albuquerque Broadcasting Co.*, 158 F.2d 900 (10th Cir. 1947).

At the same time Congress explicitly rejected the concept that a broadcast station should be required to afford a right of compulsory access for individuals wishing to express their personal views on matters of public importance. As it emerged from the Senate Committee, the bill which became the Radio Act of 1927 contained an explicit provision that:

> "[I]f any licensee shall permit a broadcasting station to be used . . . [to broadcast any matter for a valuable consideration], or by a candidate or candidates for any public office, or *for the discussion of any question affecting the public*, he shall make no discrimination as to the use of such broadcasting station, and *with respect to such matters the licensee shall be deemed a common carrier in interstate*

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[33] See *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 474 (1940); *Red Lion Broadcasting Co.* v. *FCC*, 381 F.2d 908, 928 (D.C. Cir. 1967), *aff'd*, 395 U.S. 367 (1969); *McIntire* v. *Wm. Penn Broadcasting Co.*, 151 F.2d 597 (3d Cir. 1945), *cert. denied*, 327 U.S. 779 (1946); *Pulitzer Pub. Co.* v. *FCC*, 94 F.2d 249 (D.C. Cir. 1937).

commerce: *Provided*, that such licensee shall have no power to censor the material broadcast."[34]

On the floor of the Senate this section was revised to eliminate this broad statutory obligation after a substantial policy debate.[35] Highlighting the specific character of the change wrought by the Senate is the fact that the revised section continued to provide a right of access, based on the principle of equal opportunity, in the narrow instance of elections. See Radio Act of 1927, §18, 44 Stat. 1162, 1170.

In 1934 the structure provided by the 1927 statute was carried forward almost intact to Title III of the present Act. See *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). Although attempts were again made to institute a common carrier obligation to provide private access, Congress declined to enact any of these proposals. See, *e.g.*, S. 6, 71st Cong., 1st Sess. (1929); H.R. 7986, 73d Cong., 2d Sess. (1934). Instead, Congress added Section 3(h) of the Act, 47 U.S.C. §153(h), explicitly confirming that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."

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[34] See 67 *Cong. Rec.* 12503 (1926) (emphasis added); S. Rep. No. 772, 69th Cong., 1st Sess. 4 (1926). See generally Manelli, Legislative History of the Fairness Doctrine (1968), reprinted in *Hearings on the Fairness Doctrine Before the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce*, 90th Cong., 2d Sess. (1968).

[35] Senator Dill, a major architect of the statute, objected to the common carrier obligation precisely because of the restraints it placed on the flexibility and discretion of the station. 67 *Cong. Rec.* 12503 (1926). See also 67 *Cong. Rec.* 12501-03 (1926).

Agency interpretations of the Act have reflected this principle of broadcaster responsibility virtually from the outset. For example, in *U.S. Broadcasting Co.*, 2 F.C.C. 208, 225 (1935), the Commission stated:

> "The right to determine, select, supervise, and control programs is inherently incident to the privilege of holding a station license. In fact, the right becomes a responsibility of a licensee, as he must be held to strict accountability for the service rendered."

Accord, Report on Programming Policy, 20 P&F R.R. 1901, 1908 (1960). Conversely, the Commission has repeatedly denied claims that private individuals have a right to compel stations to provide them with broadcast time on issues fully and fairly covered by the stations.[36] For, as the Commission has said, the governing precept is the "right of the public to be informed, rather than any right on the part of . . . any individual member of the

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[36] *E.g.*, letter to Washington Women's Strike for Peace, Nov. 22, 1965 (see A. 366); *Mrs. Madalyn Murray*, 40 F.C.C. 647 (1965); *Democratic State Central Committee of California*, 19 F.C.C.2d 833 (1968). BEM has relied upon *United Broadcasting Co.*, 10 F.C.C. 515 (1945), as representing a contrary view. There, a broadcaster purported not to sell time for controversial issues but allegedly applied that policy "strictly" to those whose views the station disapproved and "loosely or not at all" with respect to views it favored. *Id.* at 515. The decision, which occurred before the fairness doctrine was fully enunciated, readily squares with the underlying obligation of fair treatment for competing views (see *Red Lion*, 395 U.S. at 377). If BEM's construction were taken, the decision could not be more than an eccentric departure from an otherwise uniform line of Commission pronouncements.

public to broadcast his own particular views on any matter . . . ."[37]

This longstanding administrative construction of the Act is virtually contemporaneous with the Act itself. As the considered view of the agency charged with the statute's execution it is entitled to great respect. *E.g., Udall* v. *Tallman*, 380 U.S. 1 (1965); *Red Lion*, 395 U.S. at 381. Coinciding with statutory language and legislative history, the agency construction confirms that Congress did not impose any general access obligation on broadcasters but, on the contrary, deliberately rejected such an approach.

The lower court's decision holds in substance that the course ordained by Congress and consistently followed by the Commission for more than a quarter century is unconstitutional. Yet *Red Lion* itself shows that, so long as the public is informed, the pattern of broadcasting regulation is a matter for legislative and agency judgment. The broad phrases of the First Amendment may define the goal as the public's right to know (395 U.S. at 390) but they do not provide a blueprint that withdraws from Congress and the Commission the choice of prescribing the means, as judgment and experience may advise.

In advancing the public's right to know in broadcasting, none of the alternative patterns is without its benefits and drawbacks. Every alteration in the delicate balance established by the present Act—among govern-

[37] *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1249 (1948). The commentators have shared the same understanding. *E.g.*, Loevinger, "Free Speech, Fairness, and Fiduciary Duty," 34 *Law & Contemp. Prob.* 278, 297 (1969): "It is all viewpoints that are entitled to be heard, not all individuals or all spokesmen, except in the cases, specified by statute or a rule . . . ."

ment supervision, broadcaster discretion, and the participation of partisan voices—may more easily impair free speech than promote it. See generally II Z. Chafee, *Government and Mass Communications* 707-10 (1947). Where Congress and the responsible agency have struck one balance rather than another this Court has repeatedly cautioned against the temptation of judges to become "super legislatures," whether under the aegis of the Constitution or through conventional judicial review.[38]

A judicial reluctance to intervene is still more appropriate since the Congress and agency have maintained a continuing "grip" on the development of broadcasting. *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). Here, both have continued to provide oversight, considering proposals and instituting new requirements bearing directly on free speech interests in broadcasting.[39] Finally, electronic communication is today in a period of unprecedented flux as the potentials of the field are stretched by CATV and satellite broadcasting. This is precisely the wrong time for the lower court to freeze broadcasting into a particular posture by imposing what Judge McGowan aptly described as a "consti-

[38] *Fergusen* v. *Skrupa*, 372 U.S. 726, 731 (1963); *Daye-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421, 423 (1952). See also *American Lines* v. *Louisville & N. R.R.*, 392 U.S. 571, 592-93 (1968); *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952).

[39] For example, Congress has several times revised the Act to give statutory recognition to the fairness doctrine, amend the equal time requirement, and for other ends. *E.g.*, 66 Stat. 717 (1952 amendments); 73 Stat. 557 (1959 amendments); 86 Stat. 3 (1972 amendments). On the other hand, Congress has continued to reject proposals to impose a compulsory access obligation on stations. *E.g.*, H.R. 3595, 80th Cong., 1st Sess. (1947); H.R. 6949, 81st Cong., 2d Sess. (1950). As for the Commission measures, see p. 41 & n. 41, *infra*.

tutional strait jacket" on the regulatory program (A. 491).

B. The Commission Amply Justified Its Refusal To Dictate Station Policy on Editorial Advertisements.

In deciding whether an agency decision conforms to statutory intent and is a rational exercise of judgment, this Court has repeatedly stressed the deference due to the Commission when it determines that a given course represents the public interest.[40] What the precedents require is that the agency take account of the relevant considerations and provide a reasoned explanation for its result. In passing on BEM's complaint and DNC's request for ruling, the Commission amply justified its decision not to interfere with the independent judgment of broadcasters by requiring them to accept editorial advertisements.

In its opinions, the Commission reviewed how the fairness doctrine operated to assure that diverse views on controversial issues are laid before the public (A. 257-59). It considered the limitations of 60-second spots in contributing to public understanding on such issues (A. 264). It was properly concerned that the balance of programming could be "drastically skewed" by compulsory access (A. 263) and it identified other ways such a scheme might impair the fairness doctrine and the

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[40] *Red Lion*, 395 U.S. at 381; *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940); *NBC* v. *United States*, 319 U.S. 190 (1943). "Courts are slow to interfere with [the Commission's] ... conclusions when reconcilable with statutory directions." *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 203 (1956) (footnote omitted).

ability of stations to operate in the public interest (A. 264-65).

The Commission also gave due emphasis to the broadcaster's responsibility, imposed by the Act and long acknowledged by the Commission, to make its own judgments about the kind of broadcasting that will best serve its own listeners (A. 261-65). Diversity and independence themselves contribute to First Amendment interests, and the Commission made clear that each station may choose its own course on editorial advertising (A. 265). Lastly, the Commission noted the possibility of providing access channels through CATV systems where the inherent scarcity limitations of broadcasting do not apply (A. 266).

In applying the public interest standard of the Act, the Commission in no sense ignored First Amendment interests. Its opinions here reflect explicit concern for the operation of the fairness doctrine, for broadcaster independence, and for securing individual access through less disruptive means such as CATV. In other contexts, too, the Commission has repeatedly recognized these values by implementing measures which, whatever their individual wisdom, were specifically directed at fostering free speech interests in broadcasting.[41]

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[41] Apart from CATV access just noted and the fairness doctrine study (p. 44, *infra*), recent examples include rules limiting television network syndication practices and reserving 25 percent of prime time for non-network programs (47 C.F.R. §§ 73.658(j), (k)) and the personal attack and candidate endorsement rules upheld in *Red Lion*. *E.g.*, 47 C.F.R. §73.123. Of much longer standing are the Commission's chain broadcasting rules and the multiple ownership rules. *E.g.*, 47 C.F.R. §§ 73.131, 73.240. FM radio and UHF television were themselves fostered by the Commission to promote "a multitude of voices" (A. 265).

By any conventional standard of judicial review, the Commission's actions in this case were neither arbitrary nor irrational. The lower court, conceding the Commission's broad authority to construe "the grand and open-ended statutory requirements" (A. 455), justified its intervention on constitutional grounds and "in light of First Amendment interests" (*id.*). The First Amendment, however, does not justify a result which disserves rather than advances the public's right to know. See pp. 29-33, *supra*. The improvidence of the lower court's decision becomes even more plain when it is viewed in the context of agency responsibility.

To impose its access regime, the lower court went well beyond the traditional role of upholding or setting aside agency action. It was obliged to direct the agency to undertake an investigation and promulgate guidelines to solve the ramifying problems presented by the court's own decision. Clearly the court has extended itself into the agency's province to make and direct policy when it commits the agency to a compulsory access regime. The difficulties involved in such a regime are virtually a dismal swamp.[42] Yet the lower court's decision would force the

[42] There are innumerable problems that would have to be resolved, usually on a continuing basis, in instituting and administering a compulsory access regime: when could a commercial editorial be excluded because of its content (*e.g.*, defamatory, actionable, false or misleading, or frivolous spots); would the fairness doctrine apply to editorial commercials and if so how (*e.g.*, can spots be balanced by program time; what is the minimum ratio of reply spots); may free time to answer such commercials be required under *Cullman;* may quotas on such spots be imposed and what kind; what limits if any could be used to prevent domination by one viewpoint, repetition, or triviality; what contractual provisions (*e.g.*, indemnification; prior submission) could be imposed; what priorities among advertisers should be employed (*e.g.*, first come, first served; broadcaster discretion; urgency); how may spots be placed (*e.g.*, in or near newscasts, outside prime time); must the station explain a refusal

Commission to devote a substantial portion of its time during the years ahead to instituting a project potentially far more complex and time-consuming than the fairness doctrine itself.

If the court's opinion stands, the problems will not stop with paid editorial advertising. BEM has already announced to the Commission that compulsory access must also be provided to program time. Joint Comments of BEM, *et al.* in Docket 19260, March 21, 1972, pp. 27-29. It also now asserts that broadcasters are obliged to make free time available both for editorial advertisements and for programs "for those elements of society–local, regional and national–which lack the resources to purchase access time . . . ." *Id.* at 30-31. Plainly the next chapter will find BEM in court urging that the Constitution compels the Commission to pursue these new adventures.

It is the agency, not the lower court, which is qualified by technical competence and experience to decide whether and when major new departures in broadcasting regulation should be undertaken. It, too, can appreciate, what impact one measure may have on another in the fine-geared process of agency regulation.[43] Finally, it is

of a particular editorial commercial and how quickly must it decide; what Commission review procedures would operate and what standards would govern (*e.g.*, station good faith judgment; reasonableness). Many more problems could easily be listed, few would be easily solved, and each would invite further judicial review.

[43] For example, one serious problem of compulsory access is the financial burden thrown on stations because of their potential obligation to provide free reply time to access spots under the *Cullman* doctrine (see A. 264-65, 486). Yet the Commission has recently instituted another measure–its prime time rules (p. 41, n. 41, *supra*)–which is likely to impair the revenues of smaller

the agency that can weigh alternative means to the same end and chose the one most feasible in light of conflicting interests and its own responsibilities.

The lower court's action is especially jarring because it occurred shortly after the Commission embarked on a far-reaching inquiry designed to appraise the fairness doctrine and consider a variety of possible changes including the feasibility and design of some new variety of access. *Study of Fairness Doctrine*, 30 F.C.C.2d 26, 27 (1971). This investigation is currently under way subject, of course, to whatever disposition this Court may make of the present case. See *Order and Further Notice of Inquiry*, 33 F.C.C.2d 798 (1972).

This FCC investigation now in progress has not prejudged the question whether compulsory access is warranted. The comments being submitted both by broadcasters and access proponents may persuade the Commission this step would not be in the public interest; or conceivably the Commission could decide upon an access regime but of a very different kind from that mandated by the lower court. Whatever the agency might decide, its own regulatory position—unlike the rigid constitutional judgment of the lower court—could readily be altered in the light of future experience.[44]

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stations. Expanding CATV operations also will adversely affect stations. The Commission alone can judge how many such changes can be absorbed in any period before the cumulative result impairs the broadcaster's ability to program in the public interest.

[44] As Professor Jaffe observed of the lower court's decision, if there is to be an access regime "the regulatory scheme will have to be flexible, and flexibility is more difficult to achieve under the mighty connotations of the first amendment." Jaffe, "The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access," 85 *Harv. L. Rev.* 768, 784 (1972).

III. WTOP'S POLICY REGARDING EDITORIAL ADVERTISEMENTS IS BASED ON A REASONABLE JOURNALISTIC JUDGMENT INVOLVING NO INVIDIOUS DISCRIMINATION.

Although the lower court's decision purports to rest on First Amendment grounds, its opinion is laden with the rhetoric of equal protection (A. 474-80). WTOP's policy toward editorial commercials, however, involves no invidious discrimination, assuming *arguendo* that the policy is properly regarded as state action directly subject to equal protection principles. See pp. 52-62, *infra*. Judged by the pertinent facts and decisions of this Court, the station's approach represents a reasonable exercise of journalistic judgment.

WTOP's broadcasting policies favor the presentation not of product commercials but of public issues. Public issues are presented through a range of programming from news reports and news interviews through panel and interview programs to commentaries and editorials, while commercials are relegated to spots of 60 seconds or less. Broadcast stations devote special effort and expense to public issue programming which, in the case of WTOP, occupies most of its broadcasting day.[45] Commercials are produced and paid for by the advertisers involved. Under the fairness doctrine and related requirements, a broadcaster must make affirmative efforts to canvas the community, provide adequate coverage of public issues,

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[45] WTOP maintains a large staff of reporters and news analysts for this journalistic function and has individual reporters assigned to provide in-depth coverage on a regular basis of a variety of national and local matters including, as examples, the ghetto, Capitol Hill, and consumer matters. See Brief for BEM in the Court of Appeals, Nov. 23, 1970, App. B, pp. 5-6.

and offer a full range of viewpoints to the public. No such obligation attaches to the broadcast of product commercials, and no advertiser has a "right" to have his advertisements aired, let alone to have his products promoted as news items.

In presenting individual subjects or viewpoints on public issues, a station may not under the fairness doctrine make choices on the basis of personal preference for specific views or causes but is compelled to exercise a good faith independent judgment. See p. 22, *supra.* Certainly in the present case substantial time was devoted to the Vietnam war and the public was exposed to the full spectrum of opinions including those of BEM. WTOP has not confined "partisan voices" to commercials; the station has presented advocates who have aired strong opinions about the war and has made every effort to offer informed speakers on all sides of the issue. See pp. 9-10, *supra.*

Thus, WTOP does not prefer commercial messages to public issues nor select invidiously among viewpoints or advocates. Brought into focus, the "discrimination" attributed to WTOP by the lower court resolves itself to this: WTOP has sought to cover public issues in the context of regular programming, where the station strives for fair and effective coverage, and not in short, sponsored spots used to advertise commercial products and services. Of course, there is a "difference" in approach to the two categories because product commercials and public issue coverage present very different problems. The equal protection requirement is not violated, however, by treating "different classes" in "different ways." *Reed v. Reed*, 404 U.S. 71, 75-76 (1972).

Under the decisions of this Court, a difference in treatment is lawful under equal protection standards when it is "reasonable, not arbitrary" (*id.* at 76) and bears a rational relationship to the achievement of legitimate ends.[46] WTOP believes that its policy is the best means for assuring fair and effective presentation of conflicting views on controversial issues with a minimum of government involvement in the process of radio journalism. There is certainly a rational basis for the station's judgment that its policy will serve that end, and there are not one but several grounds which support it.

Short spots of 60 seconds or less, however useful for the sale of tooth paste, are a highly questionable medium for informing the public about controversial issues or advocating ideas. In fact, the 60-second editorial commercials proposed by BEM do not contain more than 20 or 35 seconds of substance, once identifications, introductory statements and concluding sentences have been taken into account (A. 317). "These lengths," as one advertising specialist noted, "defy discussion of issues" and encourage the "shallowest" imagery and "shoddiest" logic.[47] It is not an invidious discrimination against "ideas" for a station to present them instead in formats less susceptible to the abuses of propaganda.

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[46] *McGowan* v. *Maryland*, 366 U.S. 420 (1961); *Railway Express Agency* v. *New York*, 366 U.S. 106 (1949); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1949); *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61 (1911).

[47] Statement of John O'Toole, president of Foote, Cone & Belding, reprinted in 118 *Cong. Rec.* S 985-86 (daily ed. 1972). John Gardner, chairman of Common Cause, recently urged broadcasters not to air even the traditional election campaign spots but to require a minimum length of five minutes for such announcements. A spot announcement of 60 seconds or less, he said, "is too brief for discussion of any significant issue. It is in fact

There are also sound reasons for believing that the use of such editorial advertisements would jeopardize the fair presentation of controversial issues as contemplated by the fairness doctrine and the *Red Lion* decision. See pp. 29-31, *supra*. If the fairness doctrine were applied to editorial commercials then the station would be forced to divert program time from other issues and those with the thickest wallet would determine where emphasis is to be placed in selecting the issues for public discussion. If the fairness doctrine were not applied, the alternative could well be a "onesided flood" of partisan argument on the airwaves (A. 485).

Finally, the widespread use of editorial commercials must inevitably lead to greater government involvement in the process of broadcast journalism. Administration of a private constitutional right to require carriage of editorial commercials would entail repeated court and agency decisions on numerous questions concerning the number, content, balance, placement, and propriety of editorial advertisements. See pp. 31-33, *supra*. The guidelines contemplated by the lower court are precisely the kind of government superintendence long deemed antithetical to free speech.

These considerations cannot be dismissed as slight or fanciful. The policy followed by WTOP has long been followed by other major broadcasters. P. 8, *supra*. The same concern about presenting complex topics in 60-second spots is shared by commentators outside the

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a studied means of *not* informing the voter in any significant way." Speech of John Gardner, Feb. 23, 1972, pp. 7-8. See also Wall St. J., March 9, 1972, p. 12, and New York Times, Dec. 6, 1970, p. 25, criticizing use of spots for these purposes. WTOP's broadcasting of election spots is explained by the special statutory and administrative treatment of that subject (p. 7, n. 10, *supra*), but the station encourages the use of more thorough presentations by affording election candidates free program time.

industry. See p. 47, *supra*.[48] The Commission has confirmed that compulsory access would adversely affect the fairness doctrine; and this Court's own opinions recognize the threat to free speech from undue government regulation. See pp. 32, 40, *supra*. Since a sound basis exists for WTOP's judgment, that judgment is not rendered unconstitutional because others may take a different view of its wisdom. For, in the words of this Court, "conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure . . . ." *Dandridge* v. *Williams*, 397 U.S. 471, 487 (1970).

Several passages in the opinion below suggest that a merely "reasonable" distinction between the treatment of public issues and of commercial advertising cannot be justified when First Amendment interests are at stake and that some "very substantial harm" must be demonstrated to sustain WTOP's policy (A. 481). There are decisions that require a "compelling state interest" where a classification operates to foreclose a protected interest, although the case law is far from uniform.[49] Assuming the standard to be sound in the abstract, however, it does not effect the outcome of this case for two reasons.

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[48] There has also been direct criticism of political spot advertising in Congress. See Statement of Senator Stevenson (D. Ill.), 118 *Cong. Rec.* S 985 (daily ed. 1972). A recent bill introduced by Congressman Anderson (R. Ill.) required that stations furnish certain federal candidates free broadcast time but required minimum blocks of 15 minutes each and "formats intended to promote rational political discussion." H.R. 19904, 91st Cong., 2d Sess. (1970).

[49] *Compare, e.g., Harper* v. *Virginia State Bd. of Elections*, 383 U.S. 663 (1966) (voting), *with McGowan* v. *Maryland*, 366 U.S. 420 (1961) (religion). See generally *Weber* v. *Aetna Cas. & Ins. Co.*, 40 U.S. L. Wk. 4460 (U.S. April 24, 1972); "Developments in the Law—Equal Protection," 82 *Harv. L. Rev.* 1065, 1127-31 (1969).

First, this is not an instance in which First Amendment rights are being undermined or constrained by challenged classification. If anything is clear from *Red Lion*, it is that BEM has no private First Amendment right to insist on the use of a broadcast station. The dominating concern is the public's right to know. See pp. 25-26, *supra*. WTOP's programming extensively presents conflicting views on controversial subjects, including the Vietnam war and the BEM's own viewpoint on it, and there is no showing that its means of doing so impairs the public's right to be amply and fairly informed. Cf. *Schilb* v. *Kuebel*, 404 U.S. 357, 365 (1971).

Second, WTOP's policy is fully justified by a "compelling" interest sanctioned by *Red Lion* itself. For, as previously shown, the station's approach enhances its ability to furnish the public with a thorough and balanced exposure to conflicting viewpoints. It is the lower court's regime of compulsory access that threatens that ability by giving undue weight to the affluent and assuring pervasive government influence in broadcasting. See pp. 29-33, *supra*. In short, First Amendment interests weigh heavily in *favor* of the station's policy and, between the right of the public as defined in the *Red Lion* decision, and any private claim of BEM, certainly the former must prevail.[50]

The lower court's reliance on equal protection formulae is more ritual than substance. Its own opinion discloses that the court is seeking to secure for BEM not equal treatment with commercial advertisers but marked

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[50] See *Red Lion*, 395 U.S. at 390-91; *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945); *Lafayette Radio Electronics Corp.* v. *United States*, 345 F.2d 278 (2d Cir. 1965).

preference. Neither the lower court nor BEM would for a moment be satisfied with the stringent plenary control WTOP exercises over commercial advertising spots, their content, placement and number.[51] Indeed, the lower court went out of its way to assert that under its new access regime "the licensee should not begin to exercise the same 'authoritative selection' in editorial advertising which he exercises in normal programming" (A. 485).

In the last analysis parity of treatment between controversial questions and run-of-the-mill product commercials has little to do with the central issue. Whether or not the lower court's "general regime" of compelled access (A. 485) supplants WTOP's existing practice, the different nature of the two categories dictates differences in treatment.[52] The gist of the matter is not equality but how important issues should be presented to the public, what format should be used, and who should choose the speakers.

Under the statutory plan, Congress confided to each station the responsibility that the lower court seeks to invest in partisans like BEM, struggling to shape public

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[51] The broadcaster is, in fact, enjoined by the Commission to ascertain that no material including advertising copy is broadcast "which will deceive or mislead the public." *Report on Programming Policy*, 20 P&F R.R. 1901, 1904 (1960); *Licensee Responsibility for Advertising*, FCC 61-1316, November 1, 1961.

[52] For example, the lower court itself proposed that the Commission institute "reasonable regulations" for editorial advertisements "to prevent domination by a few groups or a few viewpoints" (A. 485). Yet when it suggested that there could be some outside limits on the amount of advertising time sold to "one group or to representatives of one particular narrow viewpoint" (*id.*), it was untroubled that no equivalent limitations would be imposed on commercial advertisements.

opinion to their own ends, and ultimately in the Commission and the courts. The journalistic judgment made by WTOP in this instance was exactly the kind of resolution the Commission has repeatedly called on broadcasters to make in the exercise of their own independent judgment. While BEM and the lower court readily characterize WTOP as a "fiduciary" or "proxy" required to act in the public interest (*e.g.*, A. 461), both would ultimately withhold from the station the very essence of trusteeship: the authority to make reasonable decisions about what course will best serve the interests confided to the station.

IV. WTOP IS NOT AN INSTRUMENTALITY OF THE STATE AND THE EXTENSION OF THE STATE ACTION CONCEPT TO BROADCASTING STATIONS IS NOT APPROPRIATE.

A. WTOP's Broadcasting Policy Toward Editorial Advertisements Was Adopted Independently of the Commission and Does Not Represent State Action.

It is well settled that the First Amendment and equal protection requirements of the Constitution extend only to state action and do not control or limit "private conduct."[53] WTOP's policy of not broadcasting editorial advertisements and its decision not to accept BEM's messages were those of the station, and neither one was instigated or compelled by the Commission. In fact, the Commission in its *BEM* and *DNC* opinions emphasized the broadcaster's discretion to make its own judgments

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[53] *United States* v. *Guest*, 383 U.S. 745, 755 (1966); *Public Utilities Comm'n* v. *Pollak*, 343 U.S. 451, 461 (1952); *Civil Rights Cases*, 109 U.S. 3 (1883).

(A. 264), and it took pains to note "that there is of course no Commission policy thwarting sale of time to comment on public issues" and "licensees are free to do so" (A. 265).

It follows that, apart from any other defects in its decision, the lower court's judgment must be reversed unless it was justified in classifying WTOP's decisions as state action for constitutional purposes. The court recognized that a finding of state action was necessary to its result and devoted almost ten pages of its opinion to arguments that broadcaster decisions are equivalent to state action.[54] Yet the lower court's discussion is a melange of remote analogies and quotations which serve only to emphasize that this Court has never applied the state action concept to private broadcasting.

Whether the relationship between a private entity and the government is of a kind that subjects the former's decisions to direct constitutional restraints is ultimately a question for the courts. Yet in broadcasting it is Congress that has designed and structured that relationship, so the statutory plan must be the starting point of any inquiry. Demonstrably, Congress did not intend to make the broadcaster an arm of the Federal Government but sought instead to maintain a benign separation between the two.

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[54] The state action determination permitted the court to invoke the familiar line of "access" cases which involved such public instrumentalities as subways and public schools. While those cases are distinguishable even if broadcasters be regarded as state instrumentalities (see p. 27, *supra*), they can have no bearing whatever if the lower court's state action determination is erroneous.

Congress, far from entrusting the function of broadcasting to the government, provided for licensing of numerous stations operating in free competition with one another, and forbad censorship by the Commission. Section 326, 47 U.S.C. §326.[55] Congress did not even impose the plenary regulation utilized for common carriers and public utilities. The Act did not confer on broadcasters the traditional protections and privileges of local monopoly; on the other hand, the Act excluded any common carrier obligation for broadcasters (Section 3(h), 47 U.S.C. §153(h)) and avoided the detailed regulation of rates, revenues and practices customary for a regulated industry. Compare Sections 201-23 of the Act, 47 U.S.C. §§ 201-23 (Title II).

As the thousands of independent stations have developed in this country, their operations resemble such traditionally private enterprises as newspapers more closely than any other analogy. In many communities, in fact, broadcasting stations are more numerous than daily newspapers and are subject to greater competition among themselves.[56] The broadcasters' independent appraisal

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[55] This Court summarized the matter in *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 474-75 (1940): "[T]he Act recognizes that broadcasters are not common carriers and are not to be dealt with as such"; "it recognizes the field of broadcasting is one of free competition"; "the Act does not essay to regulate the business of the licensee"; and "the Commission is given no supervisory control of the programs, of business management or of policy." See also *Pulitzer Pub. Co.* v. *FCC*, 94 F.2d 249, 251 (D.C. Cir. 1937).

[56] For example, in 1971 there were 7,358 commercial radio and television stations in operation compared with only 1,818 daily newspapers in the United States. FCC, *Broadcast Station Totals* for December 1971, Jan. 11, 1972; U.S. Census Bureau, *Statistical*

and frequent criticism of the actions of the government and its officials have been among the most salient characteristics of broadcasting in this country.

Under these circumstances, it is hardly surprising that until the lower court's opinion, the courts were unanimous in declining to treat broadcasters as instrumentalities of the government for state action purposes. The First Circuit squarely so held in *McIntire* v. *Wm. Penn Broadcasting Co.*, 151 F.2d 597, 601 (1945), *cert. denied*, 327 U.S. 779 (1946), saying:

> "[T]he First Amendment was intended to operate as a limitation to the actions of Congress and of the federal government. The defendant [radio station WPEN] is not an instrumentality of the federal government but a privately owned corporation. . . . Congress has not made WPEN an agency of government. For this court to adopt the view that it has such a status would be judicial legislation of the most obvious kind."

The same conclusion was reached by the First Circuit in *Massachusetts Universalist Convention* v. *Hildreth & Rogers*, 183 F.2d 497 (1950), and by the District Court in *Post* v. *Payton*, 323 F. Supp. 799 (E.D. N.Y. 1971).

These authorities are reinforced by more recent decisions in three other federal courts holding that newspapers were not engaged in state action when they

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Abstract of the United States 491 (1971). Washington, D.C., receives several dozen stations and channels (see, *e.g.*, A. 329) and has only a few newspapers. The Commission's own anti-concentration rules (*e.g.*, 47 C.F.R. §73.240) are in many respects more rigorous than the antitrust laws.

refused to accept advertisements.[57] The complainants in those cases had no difficulty showing that newspapers are subject to numerous advantages and obligations under federal, state, and municipal law,[58] and they invoked the same line of arguments relied on by the opinion below in this case. Yet, each of the courts unanimously rejected these arguments. In the words of the *Love* decision, the concept of state action is "singularly inappropriate" to describe the relationship of the press and the government. 322 F. Supp. at 1105.

In sum, the statutory plan for broadcasting is designed to maintain, rather than elide, broadcaster independence from the government. Stations in their coverage of public issues perform the same journalistic role as newspapers,

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[57] *Chicago Joint Board* v. *Chicago Tribune*, 435 F.2d 470 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971); *Associates & Aldrich Co.* v. *Times Mirror Co.*, 440 F.2d 133 (9th Cir. 1971); *Resident Participation of Denver, Inc.* v. *Love*, 322 F. Supp. 1100 (D. Colo. 1971) (three-judge district court).

[58] Examples under federal law include reduced postal rates (39 U.S.C. §3626); exemption from telephone and telegraph excise tax (26 U.S.C. § 4253(b)); exemption from custom duties (19 U.S.C. §1202, para. 270.55); and special tax treatment respecting circulation expenses (26 U.S.C. §173). See generally *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146 (1946); *Lewis Pub. Co.* v. *Morgan*, 229 U.S. 288 (1913). States and municipalities vary, of course, but in the case of the Chicago papers involved in the *Chicago Tribune* case its employees were exempt from jury service; specified legal notices and local ordinances were required to be published in them; a spate of tax exemptions applied; a local ordinance provided special advantages for street sales; and as a matter of practice newsmen were furnished special space in buildings. 435 F.2d at 473. See also *Resident Participation of Denver, Inc.* v. *Love*, 322 F. Supp. 1100, 1102 (D. Colo. 1971).

whose "historic function . . . has been to oppose government, to be its critic, not its accomplice." *Resident Participation of Denver, Inc.* v. *Love*, 322 F. Supp. 1100, 1105 (D. Colo. 1971). Prior judicial decisions have uniformly rejected the state action label for broadcasters and newspapers alike. Thus, whether one looks to design, function, or precedent, the lower court's equation of WTOP's policy decisions with state action is in error.

B. The State Action Concept Should Not Be Expanded To Embrace Independent Journalistic Decisions by Broadcast Stations.

Nothing in the decisions of this Court ordains that the journalistic judgment of an individual broadcaster, which is neither instigated nor compelled by the Commission, constitutes state action for constitutional purposes. Even brief analysis of the principal citations and generalities proferred by the lower court shows that none is controlling. While *Red Lion* is invoked by the lower court as "the most important recent development" since *McIntire* and *Hildreth* (A. 456-57), no state action issue of any kind was involved in *Red Lion* since that case concerned the lawfulness of affirmative agency action. None of the other decisions of this Court discussed below involved broadcasting, and the principles the lower court appears to derive from those decisions would essentially destroy any distinction between state and private action.

The lower court relied importantly upon cases finding state action where nominally private entities engaged in what the Court regarded as "public functions"—such as operating towns, parks or thoroughfares.[59] In this

[59] *Marsh* v. *Alabama*, 326 U.S. 501 (1946); *Evans* v. *Newton*, 382 U.S. 296 (1966); *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968).

country, however, broadcasting has been a private rather than a public function virtually from the outset. If a privately operated school is not *per se* engaged in a state action in a land where public schools abound, then surely a broadcast station does not meet the "public function" test. Compare *Pennsylvania* v. *Board of Trusts*, 353 U.S. 230 (1957).

It is equally unpersuasive to suggest that broadcasters are engaged in state action because stations are licensed and regulated (A. 460-61). A vast number of private occupations from medicine to architecture are licensed and regulated, and the regime imposed on broadcasting is designed as much to maintain a separation between the government and stations as it is to impose limitations.[60] Even in the sphere of common carriers and public utilities, where government regulation is pervasive, the authority for regarding them as engaged in state action is paper thin;[61] broadcasting stations are, in any event, not common carriers nor subject to the same pervasive regulation.

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[60] "To treat this limited and necessary involvement as a predicate for a far broader, constitutionally imposed scheme of limitations on First Amendment rights would be bootstrapping at its worst." Note, "Free Speech and the Mass Media," 57 *Va. L. Rev.* 636, 643 (1971) (footnote omitted).

[61] The only relevant discussion of this Court is a dictum in *Public Utilities Comm'n* v. *Pollak*, 343 U.S. 451, 462 (1952). There, the Court reviewed, in light of constitutional objections, the decision of the regulatory agency that the local bus company could install radio receivers in its vehicles consistent with the public safety, convenience and necessity. Unlike WTOP, the bus system was a regulated common carrier enjoying "a substantial monopoly of street, railway and bus transportation" in the community (343 U.S. at 462); and, in contrast to the present case, the agency had made a determination that the installation of radio equipment was affirmatively desirable. *Id.* at 459, 462.

The lower court's opinion asserts that broadcasters use the airways which are part of the "public domain" (A. 460). Yet "in one way or another we all use air and space,"[62] and no one would suggest that a demonstrator, who makes equal use of the "public streets," is engaged in state action and obliged to provide BEM "access" on his placard. The lower court's concluding argument that broadcasting is state action because it involves an important communications medium needs little comment; books, newspapers, and magazines are hardly less important and the very importance of broadcasting argues against, not for, new government restraints upon it.

The court below not only ignored the legislative plan for broadcasting stations and the journalistic function they perform, but stretched the concept of state action far beyond the point marked out by this Court's precedents. The issue can, in any event, hardly be decided by mechanical extrapolation from out-of-context quotations from prior decisions.[63] What should be decisive

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[62] Jaffe, "The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access," 85 *Harv. L. Rev.* 768, 783 (1972). The reference to the "public domain" was drawn from *Office of Communication of United Church of Christ* v. *FCC*, 359 F.2d 994, 1003 (D.C. Cir. 1966), which did not involve any question of state action. The phrase was there used in explaining why broadcasters were subject to public obligations and the case does not even suggest that broadcaster action amounts to state action.

[63] This Court has warned against just such an approach to state action problems, saying that state action "can be determined only in the framework of particular facts or circumstances present." See *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 726 (1961). This warning is ignored by the lower court's opinion

here is that such an expansion of the state action concept to broadcasting is not necessary to any sound purpose and its consequences would be adverse in almost every important respect.

Broadcasters in this country are presently subject to numerous requirements, both under federal legislation and administrative regulations, designed to serve the interests embodied in the First Amendment. Examples range from the equal time and fairness doctrine provisions of Section 315(a), 47 U.S.C. § 315(a), to the Commission's *Cullman* doctrine and multiple ownership rules. In this respect, the position of the broadcasters is markedly different from entities like the company town in *Marsh* v. *Alabama* and the supermarket complex in the *Logan* case (see p. 57, *supra*) where in the absence of constitutional restraints, free speech would go without protection. The immediate dangers in broadcasting rather stem from the inhibiting consequences of too much supervision and control rather than too little.[64]

The result of the lower court's action is thus not to impose regulation on broadcasting, since that already exists, but to impose new burdens and to promote a shift in responsibility for regulation to the federal courts.

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which, to borrow the words of another distinguished judge, represents "the domino method of Constitutional adjudication . . . wherein every explanatory statement in a previous opinion is made the basis of extension to a wholly different situation." Friendly, "The Bill of Rights As a Code of Criminal Procedure," 53 *Calif. L. Rev.* 929, 950 (1965).

[64] See Alfred I. duPont-Columbia University, *Survey of Broadcast Journalism* 1969-1970, at 41-45, 79-80 (1970); Statement of William Monroe, 118 *Cong. Rec.* S 3002 (daily ed. 1972); Kalven, "Broadcasting, Public Policy and the First Amendment," 10 *J. of Law & Econ.* 15, 21-23 (1967).

Issues now resolved pursuant to statutory direction or by agency action under the public interest standard of the Act would be transmuted into questions of constitutional magnitude. If the private right of access sought by BEM is constitutionally required, the courts could hardly avoid review of each subsequent Commission guideline and each application of the guidelines to particular facts.[65]

It is hard to conceive of a stopping point once broadcaster policy decisions are classified as state action. Virtually every journalistic decision of a station—from the hiring of one newsman rather than another to the choice of a documentary stressing pollution rather than the energy crisis—would provide the basis for a First Amendment claim to the Commission followed by plenary review in the federal courts. Today several thousand broadcasting stations function in this country to provide channels of information and opinion independent of government. They can hardly remain in this condition if each policy decision becomes the basis for agency review, and uniformity is prescribed by a constitutional formula.

The benefits of this new endeavor to impose a private claim to access upon the broadcasters can at best be described as speculative and uncertain. In this very case,

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[65] While a broadcaster determination with respect to programming may currently raise issues for the Commission under the fairness doctrine, and thus implicate the courts in judicial review, the involvement of the Commission and the courts is far more limited. The Commission restricts its own intervention to cases where the broadcaster fails to make a reasonable, good faith judgment, and the office of the courts is even more limited by familiar canons that confine judicial review to agency action which is itself arbitrary or otherwise egregious. Administrative Procedure Act §10(e), 5 U.S.C. §706.

for example, BEM's views have already been heard over WTOP and its very messages have been broadcast by several stations in the Washington, D.C. area. What is not speculative or uncertain is that the novel compulsory access regime requires new and on-going limitations on broadcasting that will invade station independence and enhance government involvement and control.

There is always a temptation to introduce new constraints upon the media justifying them on the ground that they will promote free speech in one fashion or another. This in essence is BEM's argument for a state action holding that applies additional limitations to broadcasters, just as is the argument of those who call for legislation forcing newspapers to be "fair." Yet as one of the foremost advocates of free speech stated long ago: "Zealous officials will keep thinking up new ways for improving the press according to their own ideals. And there is no bright line between encouragement and repression."[66]

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[66] II Z. Chafee, *Government and Mass Communications* 709-10 (1947). See also T. Emerson, *The System of Free Expression* 670-71 (1970).

CONCLUSION

For the reasons stated the decisions below should be reversed.

Respectfully submitted,

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ADDENDUM

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 3(h) of the Communications Act of 1934, 47 U.S.C. 153(h), provides:

> "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

Section 315(a) of the Communications Act of 1934, 47 U.S.C. 315(a), provides:

> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any–
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> (1) bona fide newscast,
> (2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.